FILED
APR 21 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1967

No. 1307

DALE BOAT YARDS, INC.,

Petitioner,

vs.

MABEL SZUMSKI,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW JERSEY SUPREME COURT

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The Petitioner, Dale Boat Yards, Inc., prays that a Writ of Certiorari issue to review the judgment of the New Jersey Supreme Court entered in the above-entitled cause on January 23, 1967.*

Citations to Opinion Below

The opinion on motion to dismiss ["Findings of the Deputy Director"] and the final administrative decision ["Determination of Fact and Rule for Judgment"] are unreported and are printed in the Appendix hereto, respectively at pp. 54a and 140a. The opinion of the County Court ["Determination of Facts and Judgment"] is unreported and is printed at p. 33a in the Appendix. The

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*The within cause is a companion case to *Hansen* v. *Perth Amboy Dry Dock Co.*, 48 N.J. 389, 226 A2d 4 (S. Ct. N.J., January 23, 1967) in which, the writer is advised, a Petition for a Writ of Certiorari is also being filed.

opinion of the Superior Court of New Jersey, Appellate Division, printed in the Appendix, p. 164a, is reported in 90 N.J.Super. 86, 216 A2d 256. The opinion of the Supreme Court of New Jersey, printed in the Appendix at p. 169a is reported in 48 N.J. 401, 226 A2d 11.

Jurisdiction

The Mandate on Reversal was entered by the New Jersey Supreme Court on January 23, 1967 (Appendix, p. 178a). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3).

The federal questions sought to be reviewed were raised at the administrative level at the first opportunity, *viz.*, prior to hearing by motion to dismiss for lack of jurisdiction in the Division of Workmen's Compensation (Appendix, p. 46a). It was there held that the accidental death, although occurring on the high seas, was sustained by one who had only an incidental relationship to navigation and commerce and hence, was cognizable under either State or Federal jurisdiction (Appendix, pp. 58a, 59a).

The same questions were successively raised by Brief and argument on appeals to the County Court, the Appellate Division of the Superior Court and the New Jersey Supreme Court. In the County Court, it was held that the circumstances of the decedent's death placed the case within the "twilight zone" and that the local Division of Workmen's Compensation had jurisdiction (Appendix, p. 38a). The Appellate Division reversed, holding that the cause was ". . . not one within the 'twilight zone' doctrine formulated in *Davis* v. *Department of Labor*, 317 U.S. 249, 63 S. Ct. 225, 87 L. Ed. 246 (1943). Whatever happened here happened on the high seas, and not at or near a dock, wharf or land establishment" (Appendix, pp. 165a-40). The Supreme Court of New Jersey again reversed, holding that

the "... decedent's dependents may apply for relief under our State Compensation Act regardless of the place of injury or the availability of a federal remedy" (Appendix, pp. 172a-34). Hence, jurisdiction was held to be in the local Division of Workmen's Compensation.

Questions Presented

(1) Where the death of a harbour-worker, and the events alleged to have caused it, all occur on the high seas, may Workmen's Compensation benefits validly be provided by State law under a "twilight zone" theory, or is the federal admiralty jurisdiction exclusive?

(2) Has *Calbeck* v. *Traveler's Insurance Co.*, 370 U.S. 114, 82 S. Ct. 1196, 8 L.Ed. 368 (1962) eliminated the need for a "twilight zone" by supplying a federal remedy for injuries which occur on navigable waters?

Constitutional and Statutory Provisions Involved

U. S. Constitution, Art. 3 § 2:

> "The judicial power [of the United States] shall extend . . . to all Cases of admiralty and maritime Jurisdiction. . . ."

The Longshoremen's and Harbour Workers' Compensation Act, 33 U.S.C. §§ 901-950; specifically 33 U.S.C. § 903(a):

> "(a) Compensation shall be payable under this chapter in respect to disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. No compensation shall be payable in respect to the disability or death of

(1) A master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net; or

(2) Any officer or employee of the United States or any agency thereof or of any State or foreign government or of any political subdivision thereof".

The New Jersey Workmen's Compensation Act, R.S. N.J. 34:15-7, *et seq.;* specifically R.S.N.J. 34:15-7:

"When employer and employee shall, by agreement, either express or implied, as hereinafter provided, accept the provisions of this article compensation for personal injuries to, or for the death of, such employeee by accident arising out of and in the course of his employment shall be made by the employer without regard to the negligence of the employer, according to the schedule contained in sections 34:15-12 and 34:15-13 of this title in all cases except when the injury or death is intentionally self inflicted, or when intoxication is the natural and proximate cause of injury, and the burden of the proof of such fact shall be upon the employer".

Statement

The decedent, Anthony Szumski, was employed by the Dale Boat Yards, Inc., a corporation engaged in the maintenance, repair, storage and sale of pleasure craft with a principal yard and slips fronting on navigable waters at Bay Head, New Jersey.

The decedent reported to work daily at the Bay Head yard. He worked as a general "all around man" doing mechanical repairs, painting and occasional duties pertaining to the delivery of boats on land and on boats moored in slips. During the summer, 10% of his time was spent on the water.

On July 26, 1958, the decedent was assigned to aid in the delivery of a 26 foot pleasure boat. Because of some difficulty with a trailer, he was instructed to run the boat, by sea, from Atlantic Highlands, around Sandy Hook to Bay Head, a voyage of some 35 miles. . .

During the voyage, the motor failed. It was held that his unsuccessful efforts to start the motor contributed to his death, which took place on the "high seas", at a point off the coast of Point Pleasant, N. J.

The Division of Workmen's Compensation and the County Court held the decedent's activities were such that he fell within the "twilight zone" and jurisdiction was in the Division of Workmen's Compensation. The Appellate Division, reversed, noting that whatever occured here happened on the high seas and not at or near a dock, wharf or land establishment. The New Jersey Supreme Court reversed the Appellate Division, holding decedent to have been a "twilight worker" whose ". . . dependents may apply for relief under our State Compensation Act regardless of the place of the injury or the availability of a federal remedy".

Reasons for Granting the Writ

"One question left unanswered by the Court is whether state jurisdiction is to be limited in those cases which are on the borderline between state and federal authority. Under the 'twilight zone' theory, there is concurrent state and federal jurisdiction in that area where reasonable argument could be made either way. Because of this, state awards in a situation within the area of federal jurisdiction were not overruled. Since enlarged federal jurisdiction is now offered, there is no longer any need for a 'twilight zone', and consequently, no n ed to allow state intervention on the fringe of federal jurisdiction". 17 S.W.L.J. 345, 350.

The trend, both in federal case law and textual comment, has been toward a confinement of state jurisdiction to the original "water's edge" line and a concomitant expansion or protective extension of admiralty jurisdiction toward land. See *Calbeck* v. *Traveler's Insurance Co.;* The Twilight's Last Gleaming, 37 Tulane L.R. 79; *Interlake Steamship Company v. Neilsen,* 338 F2d 879 (Ct. of App. 6th Cir. 1964); see also *Michigan Mutual Liability Co.* v. *Arrien,* 344 F2d 641, 646 (Ct. of App. 2nd Cir. 1965); *Holland* v. *Harrison Bros. Dry Dock & Repair Yard, Inc.,* 306 F2d 369 (Ct. of App. 5th Cir. 1962); *Boston Metals Co.* v. *O'Hearne,* 329 F2d 504 (Ct. of App. 4th Cir. 4th Cir. 1964). Less uniformity is witnessed in state courts, *e.g., Arp* v. *Maryland Casualty Co.,* 170 So.2d 166 (Ct. of App. La. 1965); *Rice* v. *Uwharrie Council Boy Scouts of America,* 263 N.C. 204 (S. Ct. N.C. 1965). Indeed, the view has been expressed that injuries on navigable waters are not compensable under state Workmen's Compensation Acts under any circumstances. 31 Fordham L.R. 398; 76 Harvard L.R. 85; 41 N.C.L.R. 597, 603; and see *Atlas Iron and Metal Co.* v. *Hesser,* 177 So.2d 199 (Fla. S. Ct. 1965).

In the instant case, the New Jersey Supreme Court has decided not only contra trend but, indeed, has merely rearticulated and re-imposed the "local concern" theory specifically discussed and rejected in *Calbeck* v. *Travelers Ins. Co., supra.*

New Jersey is so situate that the rulings of its Courts materially affect the maritime industry in and about the vast ports of New York and Philadelphia. The direct impact of the holding below is to reimpose the uncertainty of remedy in these important commercial centers and to recreate a confusion in the application of the Longshoremen's and Harborworkers' Act on the one hand and the different Workmen's Compensation Acts of the tri-state area on the other hand.

If, as stated in *Calbeck* v. *Traveler's Ins. Co., supra,* it was intended that

> "no ground should be yielded to state jurisdiction in cases falling within the principle of the Jensen case . . .",

the within holding is directly contrary to the Congressional intent and the intent of this Court. See *Parker* v. *Motor Boat Sales, Inc.,* 314 U.S. 244, 86 L.Ed. 184, 62 S.Ct. 221 (1941) for a case factually identical.

CONCLUSION

By reason of the vast numbers of workmen and employees affected by this decision, as well as its direct conflict with cited decisions of this Court, it is respectfully urged that an important federal question is presented which merits the grant of a Writ of Certiorari.

Dated: April 13, 1967.

Respectfully submitted,

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